92-1179

No._____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JEROME ISODORE KAHN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION

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QUESTIONS PRESENTED

1. Whether the Government may bring Continuing Criminal Enterprise prosecutions under 21 U.S.C. 848, predicated upon the legal theory that a legitimate chemical supply business aids and abets (18 U.S.C. § 2) illegal manufacturers of controlled substances by knowingly selling precursor chemicals (non-controlled substances) to persons who use them for the illicit manufacture of a controlled substance?

a. Whether this Court should resolve the split in the Circuits on the issue of whether 21 U.S.C. 848 prosecutions of drug "kingpins" may be based upon an aiding and abetting theory to support the necessary three predicate drug felonies? *See* United States v. Amen, 831 F.2d 373 (2nd Cir. 1987), *cert. denied,* 485 U.S. 1021 (1988), holding in the negative, and United States v. Pino-Perez, 870 F.2d 1230 (7th Cir. *en banc* 1989), *cert. denied,* 110 S.Ct. 260 (1990), holding in the affirmative.

b. Whether, as the Ninth Circuit ruled below, this Court's opinions in United States v. Falcone, 311 U.S. 205 (1940) and Direct Sales Company v. United States, 319 U.S. 703 (1943), permit a prosecution and conviction based upon a legitimate business' knowing sale of precursor chemicals to persons who will later combine the chemicals to manufacture a controlled substance?

c. Whether Congress intended § 848 to apply to business persons who are not "kingpins" supervising the importation, distribution or manufacture of controlled substances except as business retailers of non-controlled substances to persons who, following purchase, use the material to manufacture illegal substances such as methamphetamine? Did the Ninth Circuit err in expanding § 848 liability by applying it to petitioner, a legitimate retail businessman, who sold unregulated chemicals which others bought and thereafter mixed to manufacture controlled substances?

2. Whether the Government may bring a prosecution of a retail chemical supplier, after having direct knowledge for years of his sales activities to illegal drug manufacturers, and then be permitted to deny the petitioner basic discovery of Government documents relating to the Government's own belief that such sales were legal -- that is, documents showing that the business of knowingly selling precursor chemicals to buyers who would use them for the production of methamphetamine was not illegal, and/or Drug Enforcement Administration ("DEA") reports of contacts between DEA agents and petitioner's business partner which would show specific DEA recognition or DEA advisals that their sales conduct was not deemed illegal?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND CONSTITUTIONAL AUTHORITIES . 3

STATEMENT OF THE CASE 4

A. Procedural Summary 4

B. Factual Summary 5

REASONS FOR GRANTING THE WRIT 11

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE GOVERNMENT MAY BRING CCE PROSECUTIONS (21 U.S.C. 848) OF RETAIL CHEMICAL SUPPLIERS WHO ARE NOT INVOLVED IN THE ILLEGAL MANUFACTURE OF CONTROLLED SUBSTANCES OTHER THAN BY THEIR BUSINESS OF SELLING PRECURSOR CHEMICALS (A LEGITIMATE BUSINESS) UNDER A THEORY OF AIDING AND ABETTING THE DRUG MANUFACTURER BY KNOWINGLY SELLING CHEMICALS FOR THE PRODUCTION OF METHAMPHETAMINE? . . 18

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE AMBIGUOUS, IF NOT CONFLICTING, STANDARDS IN UNITED STATES V. FALCONE, 311 U.S. 205 (1940), AND DIRECT SALES COMPANY V. UNITED STATES, 319 U.S. 703 (1943) 34

III. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE GOVERNMENT MAY BRING PROSECUTION OF RETAIL CHEMICAL SUPPLIERS, AFTER HAVING DIRECT KNOWLEDGE FOR YEARS OF THE THEIR SALES ACTIVITIES TO DRUG MANUFACTURERS, AND THEN BE PERMITTED TO DENY THE DEFENDANT DISCOVERY OF GOVERNMENT DOCUMENTS RELATING TO THE LEGALITY OF SELLING PRECURSOR CHEMICALS FOR THE PRODUCTION OF METHAMPHETAMINE, OR DRUG ENFORCEMENT ADMINISTRATION ("DEA") REPORTS OF CONTACT BETWEEN DEA AGENTS AND PETITIONER'S STAFF WHICH COULD SHOW SPECIFIC RECOGNITION OR ADVISALS THAT SUCH SALES CONDUCT WAS NOT DEEMED ILLEGAL. 41

CONCLUSION 56

APPENDICES:

A: OPINION OF THE NINTH CIRCUIT
B. ORDER OF THE DISTRICT COURT
C: DISTRICT COURT FINDINGS OF FACT

TABLE OF AUTHORITIES

CASES

Direct Sales Company v. United States, 319 U.S. 703 (1943) . . . . passim

Garrett v. United States, 471 U.S. 779 (1985) 16, 19, 21

Gelbardi v. United States, 287 U.S. 112 (1932) 29

Jeffers v. United States, 432 U.S. 137 (1977) 20

United States v. Aiello, 864 F.2d 257 (2nd Cir. 1988) 25

United States v. Ambrose, 740 F.2d 505 (7th Cir. 1984) 27

United States v. Amen, 831 F.2d 373 (2nd Cir. 1987) . . . 1, 23, 26, 27

United States v. Baker, 905 F.2d 1100 (7th Cir. 1990) 20

United States v. Benevento, 836 F.2d 60 (2nd Cir. 1987) 24, 25

United States v. Burroughs, 830 F.2d 1574 (11th Cir. 1987) 15

United States v. Campisi, 306 F.2d 308 (2nd Cir. 1962) 14

United States v. Clegg, 846 F.2d. 1221 (9th Cir. 1988) 49

United States v. Falcone, 311 U.S. 205 (1940) . . . . . .passim

United States v. Fernandez, 833 F.2d 382 (3rd Cir. 1987) 20

United States v. Howard, 828 F.2d 552 (9th Cir. 1987) 48, 51

United States v. Miskinis, 966 F.2d 1263 (9th Cir. 1992) . . . . . passim

United States v. Pennsylvania Industrial Chemical Corporation, 411 U.S. 655 (1973) 49

United States v. Pino-Perez, 870 F.2d 1230 (7th Cir. en banc 1989). . 1, 26, 27

United States v. Power, 881 F.2d 733 (9th Cir. 1989) 26

United States v. Sinto, 723 F.2d 1250 (6th Cir. 1983) 20

United States v. Sterling, 742 F.2d 521 (9th Cir. 1984). 19

United States v. Valenzuela, 596 F.2d 1361 (9th Cir. 1979) 20

STATUTES

21 U.S.C. 802 (34)(C) & (X) . . . 13

21 U.S.C. §841(a)(1) 4, 13

21 U.S.C. 848 . . . 1, 3, 4, 18, 23

28 U.S.C. section 1254(1) . . . 2, 6

28 U.S.C. section 1291 2

31 U.S.C. §5324(3) & 5322(b) 4

Omnibus Drug Initiative Act of 1988 (102 Stat. 4181 et seq). 13

8 U.S.C. section 2(a) 1, 3

18 U.S.C. §1958(a) 4

MISCELLANEOUS

U.S. Sup. Ct. Rule 13.1. 2

Federal Rule Criminal Procedure 12.3 . . 49

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JEROME ISODORE KAHN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner JEROME ISODORE KAHN respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 20, 1992.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Ninth Circuit is reproduced in the Appendices at A-1 through A-10. [Cited hereafter as App. A.] The District Court issued a memorandum denying petitioner's motion for judgment of acquittal which is reproduced in the Appendices as B-1 through B-19. [Cited hereafter as App. B.]

JURISDICTION

This Petition arises from Mr. Kahn's direct appeal following his conviction in the district court. The Court of Appeals for the Ninth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. section 1291. On October 20, 1992, a panel of the Ninth Circuit affirmed the district court's judgment.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1254(1). This petition is timely filed. U.S. Sup. Ct. Rule 13.1.

STATUTES AND CONSTITUTIONAL AUTHORITIES

This Petition raises issues that involve the Fifth Amendment to the United States Constitution, 21 U.S.C. § 848(c) (1988) (the "CCE" or "kingpin" statute) which states in pertinent part:

> [A] person is engaged in a continuing criminal enterprise if --
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony [sic], and
>
> (2) such violation is a part of a continuing series of violations of this chapter or subchapter II of this chapter --
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person derives substantial income or resources.

Title 18 U.S.C. section 2(a), states: "[w]hoever commits an offense against the Untied States or aids, abets, counsels, commands, induces, or procures its commission, is punishable

as a principal."

STATEMENT OF THE CASE

A. Procedural Summary. Petitioner pleaded guilty to one count of conspiring to structure money deposits to avoid the currency reporting requirements of 31 U.S.C. §5324(3) and 5322(b). Pursuant to a disposition agreement, a count charging a violation under 18 U.S.C. §1958(a) was dismissed, and two remaining counts charging CCE (Count I) and conspiracy to manufacture methamphetamine (Count II) were tried to the court under stipulated facts on May 20, 1991, with the understanding that no sentence would be imposed on Count II.

The case was submitted to the court based on stipulated facts taken from the grand jury testimony. App. B-2. The grand jury testimony was provided as well. Ibid.

The district court found petitioner guilty of Count I, being a "kingpin" of a continuing criminal enterprise under 21 U.S.C. § 848(c), and Count II, conspiracy to manufacture methamphetamine under 21 U.S.C. §841(a)(1). App. B-2.

The court sentenced petitioner to twenty-six years confinement on Count I and a concurrent five years on Count III. Count II was dismissed. E.C.R. 98.

B. Factual Summary. As to the charge of a continuing criminal enterprise, the parties stipulated to the follow facts:

> In February, 1985 defendant Jerome I. Kahn (hereinafter referred to as "Kahn") purchased Entropy Laboratories, Inc. from Robert and Donald Dickson and David Osborne. Kahn changed the name of the company from Entropy to Quantum Laboratory Supply. Over the next few years Kahn operated his company under that name and a number of related names at numerous locations, including Carlsbad, San Clemente, Riverside and Henderson, Nevada. Throughout this time period the primary retail outlets were the Carlsbad and San Clemente stores. The main store, located in Carlsbad, sold very large quantities of the chemicals which were the precursor chemicals for the clandestine manufacturing of methamphetamine. Specifically, the primary chemicals sold by Kahn's stores were ephedrine, hydriotic acid, and red phosphorous. Additionally, the glassware used in the clandestine manufacturing of methamphetamine was sold in large quantities at these stores.
>
> During this period of time, with regard to the business of Quantum and its employees,

Kahn occupied the position of an organizer, supervisor and manager. Kahn acted in concert with at least five other persons in his position as organizer, supervisor and manager, including the following persons: Ruta Kahn, Tina Louise Wachtel, Kathleen McCurdy, Robert Poppleton, James Ingegno, Grace Chaney, Bruce Strickler, Denise Huber, Sherry Cape, Robert Schli [sic], Peggy Lewis, and co-defendant Victoria Humphries Kahn. Most of these individuals were directly involved in the daily operations at the assorted Quantum stores, including the direct retail sales of the various chemicals and glassware.

With regard to the majority of customers of the chemicals and glassware supplied by Quantum, all of the employees had reasonable cause to believe that the individuals were purchasing the chemicals and glassware in order to illegally manufacture methamphetamine. Kahn himself had reasonable cause to believe that the chemicals and glassware sold would be used to illegally manufacture methamphetamine. On occasion, Kahn himself actually sold chemicals to customers of Quantum, having reasonable cause to believe that these customers would use the chemicals to manufacture methamphetamine illegally.

Some of the purchasers were very regular customers at Quantum and would order the chemicals and glassware needed by the use of slang terminology such as a "fifty-liter set-up" to refer to the glassware needed to manufacture

fifty-liter quantities of methamphetamine. Additionally, the chemicals would be referred to in such slang terminology as "white" (ephedrine), "red" (red phosphorous), and "acid" (hydriotic acid). On occasion, Quantum employees would respond to questions by customers relating to glassware or equipment, which answers would enable the customer to manufacture methamphetamine in a more expeditious or safe manner. Literally hundreds of individual or separate batches of methamphetamine were manufactured by individuals after acquiring their chemicals and glassware from Kahn's various stores.

As a result of Kahn's operation of Quantum, Kahn derived and obtained substantial income and resources. During the two years of operation, Kahn's stores had gross sales of between 7 and 8 million dollars, which represented profits of between 3 and 4 million dollars.

In 1987 Kahn was concerned that law enforcement authorities were looking at the Quantum operation. He took steps to place other individuals on the title to the various stores. Further efforts were taken to establish a shell corporation out of Mexico which would appear to be the owner of the various stores.

When the County of San Diego established a reporting requirement and a mandatory waiting period for the purchase of ephedrine in late 1986, customers desiring

ephedrine from the Carlsbad store were directed to acquire that chemical from the San Clemente store in the County of Orange, which had not yet enacted any such law. When the reporting requirements for the purchase of ephedrine became effect in the State of California in 1987, Kahn opened a very large warehouse in Henderson, Nevada, to which individuals were referred to [for] the purchase of ephedrine. When law enforcement agents executed warrants in Henderson and closed down the business there by seizing cash and chemicals, Kahn opened a store in Salt Lake City, Utah to sell ephedrine. Additionally, he arranged for the storage of large quantities of ephedrine in Utah with the expectation that the value of the ephedrine would increase ten-fold when ephedrine became illegal.

When Kahn learned of the execution of warrants at this various Quantum facilities in May 20, 1988 he fled from San Diego, and he lived in other areas of the United States and in Mexico under assumed names until he was ultimately arrested in April, 1990 in Arizona.

During the course of Kahn's involvement with Quantum, he never received any funds from the methamphetamine operations of Quantum's customers other than what they paid for the purchase of the chemicals and glassware. Quantum never gave credit to customers, and did not loan them money. Quantum employees were instructed not to give advice of chemical procedures relevant to the manufacture of methamphetamine. E.C.R. 41-45; *see also* App.

B, 3-5.

Based on the above, the district court made the following findings: **1)** the petitioner's sale of then unrestricted chemicals was "similar to the sugar and yeast [sales] in Falcone." App. B., 11-12; 2); **2)** that ephedrine has "virtually no legitimate use, other than the manufacturing of nasal decongestants." App. B-12; **3)** "hundreds of separate batches of methamphetamine were manufacture by individuals after acquiring their chemicals and glassware from Kahn's various stores." App. B-12; **4)** some employees before the grand jury testified that customers were "unsavory or looked like drug dealers;" App. B-13; **5)** when local and state reporting regulations for the sale of ephedrine were enacted, petitioner took "specific and directed measures to avoid those reporting requirements" such as by relocating stores to unregulated jurisdictions, putting other individuals on the title to various stores, and storing large quantities of ephedrine in Utah in hopes of an increase in value. App. B-13; **6)** employees used

drug slang terms[1] which evidenced "more than a suspicion of the buyer's intended use." App. B-14; 7) employees advised customers relating to glassware or equipment to enable the customer to manufacture methamphetamine in a more expeditious or safe manner. App. B-14; 8) Price discounts were offered on chemicals if purchased in large quantities, which support a finding petitioner had a stake in the venture of the buyer's illicit activities. App. B-15. As a result of the above findings, the district court concluded that each sale made by petitioner's employees constituted a separate conspiracy with the buyer, and thus formed part of a continuing series of violations under the CCE statute. App. B-15.

The district court also rejected arguments that petitioner would not have CCE-kingpin liability if he were merely an aider and abettor of the predicate continuing series of drug offenses -- "the predicate offenses for Kahn's CCE charge can

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[1] The stipulated facts, quoted above, reflect that the buyers used the slang, not the employees.

be the aiding and abetting of others, his customers, to violate the narcotics laws." App. B, 15-18.

REASONS FOR GRANTING THE WRIT

During the mid-1980's, petitioner ran a legitimate chemical supply business. For the time period involved in the charges, none of the precursor chemicals sold by his company were listed as controlled substances. If a purchaser bought several chemicals from petitioner's business and combined them in accordance with a formula, he or she could produce methamphetamine, a controlled substance. For years, the Government was aware that petitioner and other chemical suppliers were selling such chemical combinations to buyers who independently later converted them into methamphetamine. For example, when law enforcement agents discovered methamphetamine laboratories, the name of the supply company could be identified.[2]

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[2] In United States v. Miskinis, 966 F.2d 1263, 1265 (9th Cir. 1992), the court noted that for a eighteen month period between January 1984 to August 1985, the government seized 130 meth labs, and all but one

In late 1985 and early 1986, San Diego newspapers ran a series of articles on how to manufacture methamphetamine which prompted a local television news crew to visit chemical supply outlets to show how easy it was to buy the precursors. As an adjunct to the story, DEA Agent Ron D'Ulisse told the news media that what the retailers were doing was "immoral."[3]

Evidently, in 1988, the government decided that it was a federal offense for legitimate chemical supply houses to sell precursor chemicals to buyers whom they knew would use the chemicals to manufacture of methamphetamine. In 1988, it executed search warrants on petitioner's business,[4] and this prosecution began.

Review should be granted in this case to answer several important questions going to the legitimate reach of government

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bought its products from defendant Miskinis's business, named RJM.

[3] The November 3, 1986, KFMB-TV videotape of Mr. D'Ulisse's remarks as they were telecast to the San Diego community was played to the Ninth Circuit panel at oral argument below.

[4] The government executed warrants on RJM in August of 1988. United States v. Miskinis, supra at 966 F.2d 1265.

power.

The Right to Discover Material to Support an Apparent Authority Defense. First, given that numerous chemical retailers were openly selling precursor chemicals for years[5] with knowledge of federal law enforcement at a time when there was no statute precluding such sales of precursors,[6] it was a denial of due process to deny petitioner the elementary tools of his defense, to wit, discovery of materials in government files showing: a) that during several of the years of the operation of petitioner's business, the government itself did not believe there to be a federal law violation by such conduct,

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[5] *E.g.*, RJM had been doing business for nine years (from 1979 to 1988) prior to the government seizure and arrest. United States v. Miskinis, supra at 1265.

[6] By the Omnibus Drug Initiative Act of 1988 (102 Stat. 4181 **et seq**), which took effect in March of 1989, for the first time it became a violation of the Controlled Substances Act to possess or distribute a listed chemical "knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance...." 21 U.S.C. 841(d)(2). "Listed chemical" precursors for methamphetamine were added to Title 21 to include ephedrine and hydriotic acid. 21 U.S.C. 802 (34)(C) & (X). Thus, it is still not a crime to sell unlisted chemicals even with reasonable cause to believe of their intended illicit use.

and b) that it communicated such information in its own internal documents as well as to representatives at petitioner's store. Such discovery would have provided petitioner with material for defenses of estoppel as well as the lack of *mens rea*.

Clarification of Distinction between Falcone and Direct Sales. Second, the line between this Court's decisions in United States v. Falcone, 311 U.S. 311 (1940), and Direct Sales Company v. United States, 319 U.S. 703 (1943), is so vague as to cause legitimate retail sellers to conduct business at their peril. Falcone states that selling non-controlled products to customers with knowledge that the latter will use them to create illicit substances is, in the absence of other evidence showing intent to assist the buyer in his illegal venture, insufficient to prove a conspiracy between the buyer and seller.[7] Direct Sales, relying on the controlled nature of the

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[7] Petitioner did not exhibit the collusion with the buyers as described in United States v. Campisi, 306 F.2d 308, 310 (2nd Cir. 1962)("the court in Falcone evidently thought it undesirable to charge a merchant with the unlawful use a customer may make of his produce, although he may know of the unlawful use, and he is not involved in the subsequent wrongdoing.")

substances sold in that case and other factors including warnings of its illegal sales practice, found sufficient evidence of intent.

Here, as the district court noted, the petitioner's sale of then unrestricted chemicals was "similar to the sugar and yeast [sales] in Falcone." App. B, 11-12.[8] The balance of the factors relied upon by the district court evidence knowledge of the illicit purpose of the purchases, but hardly show a separate conspiracy between the buyer and seller. The court of appeal did not rely on this theory to uphold the judgment; rather, it found petitioner's liability could be predicated on aiding and abetting. App. A, 9-10; see fn. 3 ("aiding and abetting is a viable theory of predicate liability in this case").[9]

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[8] This is to be contrasted with Direct Sales where there was a regulation which the company was violating -- the Harrison Act which criminalized the distribution of opiates for other than medical purposes.

[9] The court of appeals' ruling below is correct in it's implicit rejection of the district court's holding that separate conspiracies arose every time petitioner's employees simply sold chemicals to a buyer who then went out and manufactured methamphetamine. *See* United States v. Burroughs, 830 F.2d 1574, 1581 (11th Cir. 1987) ("Where the buyer's purpose is merely to buy, the seller's purpose is merely to sell and no prior contemporaneous understanding exists between the two beyond the sales agreement, no conspiracy has been shown. No joint objective exits among the two, even though both are aware of the

Intent of Congress. Third, Congress never intended the CCE "kingpin" statute to be extended to persons such as petitioner, a defendant who neither manufactured, imported nor distributed controlled substances. The "kingpin" statute "... is designed to reach the 'top brass' in the drug rings, not the lieutenants and foot soldiers." Garrett v. United States, 471 U.S. 779, 781 (1985). This case (and the Ninth Circuit opinion in Miskinis[10]), elevates a civilian supplier to field general status. Whatever the merits of other strategies in the war on drugs, the Government cannot stretch vicarious theories of liability to metamorphosize a businessman who sells precursor supplies into a drug "kingpin" as has been done in this and other cases.

Further, there exists a split in the Circuits as to whether one can be convicted of CCE liability based upon aiding and

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illegal nature of the goods." However, the court then erroneously relied upon its factually distinguishable decision in United States v. Miskinis, supra, to uphold the conviction on a aid and abet theory.

[10] Because Miskinis's case was vacated for further review in the district court, it has not been before this Court. *See* 959 F.2d 243.

abetting others in the commission of the minimum necessary three predicate drug offenses. Here, a chemical supply businessman has been given "drug kingpin" status and liability despite the fact that no one in his business committed drug offenses, but rather only because they functioned in the course of an otherwise legitimate chemical supply business as a source of precursors to the actual drug manufacturers. If not turning the rationale for CCE status on its head, this result grossly expands "kingpin" liability far beyond its intended purpose. Any otherwise legitimate businessman with over five employees whose staff is deemed to have aided and abetting three or more drug felonies is susceptible to a drug "kingpin" prosecution.

This is not what Congress intended. Persons guilty of aiding and abetting a crime are subject to punishment for that crime. But if a business aids and abets three or more drug felonies by knowingly selling materials which aids a drug manufacturer, that does not make the businessman a "drug kingpin." By the rationale of the court below, taken from its

Miskinis ruling, a business which knowingly sells only glassware, or temperature gauges or simply paper towels to persons who will use the material for drugs manufacture can be deemed an aider and abetting of the manufacturer. If three such sales are made, the predicate is laid to make the proprietor of the business with five or more employees a "drug kingpin." That is what happened here. This is not the law.

I.

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE GOVERNMENT MAY BRING CCE PROSECUTIONS (21 U.S.C. 848) OF RETAIL CHEMICAL SUPPLIERS WHO ARE NOT INVOLVED IN THE ILLEGAL MANUFACTURE OF CONTROLLED SUBSTANCES OTHER THAN BY THEIR BUSINESS OF SELLING PRECURSOR CHEMICALS (A LEGITIMATE BUSINESS) UNDER A THEORY OF AIDING AND ABETTING THE DRUG MANUFACTURER BY KNOWINGLY SELLING CHEMICALS FOR THE PRODUCTION OF METHAMPHETAMINE?

A. 21 U.S.C. section 848 Was Never Intended to Apply to Businesses Which Only Supply Equipment and/or Precursors to Illicit Drug Manufacturers.

The CCE statute was never intended to be stretched so

far as to make a legitimate business person who supervises five[11] or more persons in his or her business a CCE "drug kingpin" by: a) holding that the knowing sale of precursors to drug manufacturers was itself a crime which petitioner aided and abetted,[12] and that, b) a person who himself sold no illegal drugs, made no illegal drugs, and had no connection with those persons who did so other than by the legal sale of precursor chemicals at his business, is himself a "kingpin" of a continuing criminal enterprise.

The "kingpin" statute "... is designed to reach the 'top brass' in the drug rings, not the lieutenants and foot soldiers." Garrett v. United States, 471 U.S. 779, 781 (1985); United

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[11] The elements of a CCE offense are that the defendant must have committed a felony violation of federal narcotics law, the conduct must occur as part of a continuing series of violations, the activity took place in concert with five or more persons of which the defendant acted as an organizer, supervisor or manager, and from which he obtained substantial income or resources. United States v. Sterling, 742 F.2d 521, 525 (9th Cir. 1984).

[12] See Arguments I.B. and II infra.

States v. Baker, 905 F.2d 1100, 1104 (7th Cir. 1990)[13]. If the infantry and mid-level leadership of the drug operation are excluded, then *a fortiori*, so too must be persons outside the organization who merely sell raw materials to the employees. This statute excludes employees of the "kingpins" from liability. If petitioner were actually in the employ of an illegal drug manufacturer and provided precursors for the kingpin's drug manufacturing ring, as an employee he would be not liable for "kingpin" status. Here, instead of being an employee of a kingpin, petitioner's status is even further removed from any illicit drug activity. He had a legitimate chemical supply business which had no relationship to an illicit drug

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[13] *See also* Jeffers v. United States, 432 U.S. 137, 156 n. 26 (1977) (Congressional aim of CCE was to punish the "professional criminal"); United States v. Fernandez, 833 F.2d 382, 385 (3rd Cir. 1987) (CCE is "aimed at those trafficking in prohibited drugs on a continuing, widespread, substantial and supervisory basis"); United States v. Sinto, 723 F.2d 1250, 1261 (6th Cir. 1983) (CCE is "aimed at organizers and leaders of narcotics operations"); United States v. Valenzuela, 596 F.2d 1361, 1367 (9th Cir. 1979) (CCE aimed at enterprises "engaged in the illegal importation, manufacture and distribution of controlled substances"). Because petitioner's chemical supply dealt with no controlled substances, or even federally regulated substances, he simply did not run a "narcotics operation."

manufacturer other than through his employees' sales of precursors and equipment.[14] Petitioner thus has less culpability than a foot soldier or lieutenant of a drug organization, yet he is treated as if he were the head of one. Congress never intended the "kingpin" statute to stretch so far.

Because anyone convicted of a drug offense under any legal predicate for liability is subject to punishment, it is inconceivable that Congress would have intended that the CCE law be aimed at drug "kingpins" and then apply it to a person so distantly connected to illicit drug manufacturers. As this Court said in Garrett, "... Congress intended the CCE provision to be a separate criminal offense which was punishable in addition to, and not as a substitute for, the predicate offenses." 471 U.S. 779.

Petitioner's case is simply not the "carefully crafted

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[14] Demonstrative of the intent of the CCE statute is section 848(b) which states that for enhanced CCE status (the so-called "super CCE kingpin"), the predicate crimes must involved at least 300 times the quantity of controlled substances described in 21 U.S.C. 848(b)(1)(B). This evinces an intent that CCE liability be for kingpins of large-scale illicit drug organizations and not peripheral suppliers of precursors.

prohibition aimed at a special problem" (id. at 781) which Congress intended to harshly punish -- "the big-time drug operator" (id. at 784), or the "big-time drug dealer." (id. at 785). Petitioner was convicted of one count, the CCE, based solely upon the multiple sales of precursors to business customers who left the store and manufactured methamphetamine. Petitioner had no stake in the buyer's illegal manufacturing, did not associate himself with such conduct, and did not participate in it in order to make it succeed.

Simply stated, at worst, during the course of his lawful business, petitioner's employees sold materials later used by drug manufacturers to create controlled substances. If any such sale was a crime (and petitioner was not even charged with such substantive crimes for the sales of precursors), then Title 21 provides ample punishment for that illegal conduct. But in no event can a person such as petitioner be labeled the "kingpin" of an illegal drug manufacturing enterprise. His supply business neither handled nor manufactured illegal drugs.

Extending the statute to him is a distorted elongation of the statute to persons who were never intended to come within its draconian net.

As will be discussed in the next subargument, the above statutory intent analysis is but one reason an aid and abet theory is unavailable to the Government to establish predicate offenses for a CCE violation. If the CCE was aimed at kingpins, the federal courts are not free to expand the basis of CCE liability through an aiding and abetting theory as was used here.

B. The Statute Does Not Permit the Use of Aiding and Abetting of the Predicate Drug Offenses to Make Business Persons Such as Petitioner a Drug "Kingpin."

There is a conflict in the Circuits as to whether the Government may prosecute an aider and abettor under the "kingpin" statute (Continuing Criminal Enterprise, 21 U.S.C. 848). In United States v. Amen, 831 F.2d 373 (2nd Cir. 1987), *cert. denied,* 485 U.S. 1021 (1988), the issue before the court was whether a non-employee who knowingly provides

direct assistance to the head of a drug organization in supervising and operating the CCE can be punished under section 848. The court answered in the negative. Id. at 381. "While the legislative history makes no mention of aiders and abettors, it makes it clear that the purpose of making CCE a new offense rather than leaving it as sentence enhancement was not to catch in the CCE net those who aided and abetted the supervisor's activities, but to correct if possible constitutional defects by making the elements of the CCE triable before a jury." Id. at 382.

In discussing the legal difficulties which would ensue from making aiders and abettors liable but not CCE employees, the court asked: "How does one determine whether a person is an employee or third party? What of the businessman who leases a boat to a CCE engaged in importation? What about the kingpin's bodyguard? Or his lawyer?"

In United States v. Benevento, 836 F.2d 60, 71-72 (2nd Cir. 1987), the Second Circuit again ruled that an aider who

provided the use of his home as a drug manufacturing laboratory, maintained detailed financial records for the enterprise and contributed capital to fund the drug venture and attempted to smuggle currency out of the country for the kingpin's operations was not liable for CCE under an aiding and abetting theory. Benevento simply was not a kingpin.

The Second Circuit, in United States v. Aiello, 864 F.2d 257, 259 (2nd Cir. 1988), made it clear that true kingpins could be found guilty of the necessary three predicate drug violations for CCE status based upon aiding and abetting. There, Aiello was the undisputed "president" of a longstanding heroin and cocaine distribution network. He himself sold a kilo of heroin on one occasion while on other occasions he constructively possessed it. The Circuit distinguished its decisions in Amen and Benevento because the defendants there were not "kingpins" of drug organizations and thus could not be convicted of a § 848 based on their aiding and abetting the kingpin. (The same distinction applies to petitioner.) But Aiello was himself a

kingpin and there is no bar to finding the predicate felonies through an aid and abetting theory.

Curiously, the Ninth Circuit itself favorably cited the Amen doctrine to the effect that the CCE statute targeted only one type of participant (the kingpin) and that "a person cannot be convicted of aiding and abetting the violation of section 848." United States v. Power, 881 F.2d 733 (9th Cir. 1989). There, the Ninth Circuit contrasted prosecutions for the substantive offense of possession with intent to distribute a controlled substance and held that an aiding and abetting theory would be appropriate to convict a defendant of such a section 841(a)(1) offense.

In United States v. Pino-Perez, 870 F.2d 1230 (7th Cir. *en banc* 1989), *cert. denied,* 110 S.Ct. 260 (1990), the court held that persons who assist drug kingpins but are not supervised by them may be convicted of aiding and abetting a CCE and must be punished according to the terms of the statute. It also recognized that "persons supervised by the

kingpin cannot be punished as aiders and abettors." Id. at 1231. If they were chargeable as his aiders and abettors, the purpose of the kingpin statute -- to punish the kingpin more severely than other drug offenders -- would be thwarted." Id. at 1231-1232. The court refused to interpret the statute also excluding the non-employee aider an abettor. Id. at 1232.

The defendant in Pino-Perez supplied cocaine to a drug ring in southern Wisconsin headed by Nicholas. He was *the* cocaine supplier to Nicholas' enterprise, and was a bigger cocaine dealer than Nicholas, the kingpin. Id. at 1232. The court, disagreeing with the Second Circuit's Amen case[15] and

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[15] Although it could not say "amen" to the Amen (id. at 1235), it did say "adios" to its own somewhat contrary decision in United States v. Ambrose, 740 F.2d 505, 509 (7th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985). There, the court noted the inappropriateness of extending CCE liability through use of an aiding and abetting theory to "...the merchant who sells supplies to the kingpin knowing he is engaged in the narcotics business." The court observed the irony of a situation in which employees of the "kingpin" are exempt under the law from CCE liability, while the suppliers, not being under the "kingpin's" direction, would be liable. Id. Ambrose held that although aiders and abettors could be punished as kingpins, the district court was not required to do so. The remedy utilized in Ambrose was to remand the case for resentencing to allow the district court, in its discretion, to sentence the defendants under the less draconian provisions of Title 21 (*i.e.*, other than under section 848). Later, the court in Pino-Perez decided its

recognizing the obvious "imperfect mesh between" the CCE and aid and abet statutes, sustained the CCE conviction based on an aid and abet theory.

Within the majority opinion are the seeds of its own error. The majority recognized that if it is correct, "could not assistants outside the organization be deemed aiders and abettors and be punished more severely than important operatives within the organization?" Id. at 1234. The majority down-played this and related problems with the not-so-comforting observation that: "The absence of any litigation over the issue of which accomplices of a drug kingpin are aiders and abettors provides some reassurance on this score." Id. at 1235. The limitation, according to the majority opinion, is that to aid and abet a CCE offense, the offender must "want the kingpin's enterprise to succeed." Ibid. Stretching CCE liability to "kingpins" who do not supervise a drug enterprise, as was done here, destroys any such "reassurance."

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approach in Ambrose was wrong.

The dissenting opinion states that "when the structure of the main offense speaks to the scope of accessorial liability, Gelbardi [v. United States, 287 U.S. 112] tells us, § 2(a) ought not be taken literally. Indeed, the court today refuses to take § 2(a) literally, for it says that the kingpin's subordinates [the employee exception] may not be convicted as aiders and abettors."

In petitioner's case, the appellate court labeled petitioner a "kingpin" in his own right simply because he owned a chemical supply business which had more than five employees, and by inappropriately asserting that petitioner's business actively aided the manufacturers by:

> making the precursor chemicals for methamphetamine available . . . with the knowledge that they would be used for an illegal purpose,[16] and taking affirmative steps to

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[16] The stipulated facts do not state the employees or petitioner actually had such knowledge. The stipulation reads: "all of the employees [and petitioner] had reasonable cause to believe that the individuals were purchasing the chemicals and glassware in order to illegally manufacture methamphetamine." Since this is a serious felony case, negligence concepts of *mens rea* do not apply. There was no proper basis for the court's finding of the *mens rea* of knowledge. In

> enable . . . customers to conceal their identity from DEA investigators, to evade surveillance, and to avoid the applicable reporting requirements -- [the defendant] significantly aided and abetted . . . manufacturer[s] of methamphetamine . . . . App. A-8, quoting United States v. Miskinis, 966 F.2d 1263, 1267 (9th Cir. 1992)

It must be noted that the stipulated facts in petitioner's case (unlike those in Miskinis), state:

> During the course of Kahn's involvement with Quantum, he never received any funds from the methamphetamine operations of Quantum's customers other than what they paid for the purchase of the chemicals and glassware. Quantum never gave credit to customers, and did not loan them money. Quantum employees were instructed not to give advice of chemical procedures relevant to the manufacture of methamphetamine. E.C.R.45. (Emphasis added).

Thus, the stipulation does not support the finding of either actual knowledge of the buyers' use of the material purchased or that petitioner instructed his employees to aid the

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any event, as is discussed in the next argument, mere sales of its products by a business with actual and full knowledge of the improper use by the buyer is not criminal -- a legal point of law which the court below did not even address (although fully raised in the briefing).

chemical buyers in do's and don'ts of drug manufacturing. Further, Mr. Miskinis was the supplier of chemicals for virtually every meth lab in San Diego County; he took affirmative actions to allow the customers to conceal their identity for the DEA, to evade surveillance, avoid reporting requirements (966 F.2d 1263).[17]

In United States v. Miskinis, supra, the Ninth Circuit noted that the "Second and Seventh Circuits have reached opposite conclusions" on the question of whether an individual whose only criminal conduct consisted of aiding and abetting a kingpin may be convicted under section 848. It did not decide the question: "we have considerable difficulty with the approach adopted by the Seventh Circuit [Pino-Perez decision,

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[17] In the unpublished portion of the opinion (No. 90-50025, filed April 10, 1992), the Miskinis Court further noted that Miskinis' employees routinely made off-site deliveries, warned customers about surveillance, buried chemicals in the ground, and removed, at Miskinis' direction, labels on the chemicals sold so as to make identification of the source of supply difficult. Petitioner's employees did none of these things. Because of the stipulated facts trial in petitioner's case, this Court is in the same position to gauge the merits of the facts of this case as were the district and appeals courts.

but], there is no need to decide the first question here." Ibid. Rather, it held that Mr. Miskinis was a kingpin in his own right in that he not only functioned as a supplier of the precursor chemicals to the methamphetamine manufacturers, but also took steps over a long period of time to enable the customers -- the illegal drug manufacturers -- to conceal their identity and evade official surveillance and various reporting requirements. Ibid.

In petitioner's case, the court simply adopted the reasoning of Miskinis and affirmed petitioner's conviction based on his aiding and abetting the manufacture of methamphetamine -- "he is a kingpin in his own right,...." (App. A-10). The court below elevated petitioner to "kingpin" status based on his running of an otherwise legitimate chemical supply business which had more than five employees and because of the income sustained from selling the chemicals to persons who would use them to make methamphetamine.

This is a misuse of both the CCE and aid and abet

statutes.[18] While in the next argument, petitioner will demonstrate how this court's own precedent forbids such an expansion of vicarious theories of criminal responsibility to suppliers, here petitioner argues that aiding and abetting cannot be the basis for petitioner's CCE responsibility.

A good example of the inappropriateness of the use of aiding and abetting for CCE liability as to petitioner is the exemption of employees. If an employee of a CCE kingpin drug manufacturer had the sole task of going to the chemical stores and buying all of the precursors needed to manufacture methamphetamine, that employee would be exempt from CCE responsibility while the operator of the supply business would have such responsibility through an aiding and abetting theory. Congress did not intend to create such an absurd provision

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[18] As noted *supra*, the Congress has now passed laws making it a crime to knowingly supply certain listed precursor chemicals. Now, a precursor supplier of listed chemicals who otherwise met the elements of a CCE would be subject to the harsh penalties. Here, supplying precursors was not prohibited by federal law, yet the Government wrongly expanded vicarious theories of liability (*i.e.*, aiding and abetting) to bring this chemical supplier within the reach of the CCE.

which would exempt directly involved CCE employees and inculpate the businesses frequented by the employee.

Petitioner's business was not clandestine as it was open to the public and advertised in phone books.[19] It consulted attorneys on how to operate within the law;[20] it handled no controlled substances and it dealt at arms length with all of its customers.[21] The mere sale of legal materials to persons who used them for illegal purposes cannot make petitioner into a

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[19] See Grand Jury testimony of Thomas Elrod, GJRT 4 (found Quantum in the phone book). Employee Roger Carlin found his job at Quantum in the want ads. GJRT 1.

[20] Employee James Ingegno testified that petitioner had two attorneys who he consulted on business and legal matters. GJRT 15. The company accountant testified to petitioner's motivation: He didn't want to do an illegal thing, he wanted to do legal things to make money. Poppleton, GJRT 13.

[21] Employee Sherry Lee Cape testified that Quantum didn't have the home phone numbers of any customers or a list of people to contact when a certain supply came in. There was no credit business at all. Cape never heard any conversations between employees and customers regarding the manufacture of meth. GJRT 25-26. Employee Roger Carlin testified that the company routinely stocked fifty to sixty chemicals (*i.e.*, not just ephedrine, red phosphorous and hydriotic acid), and never got to know the customers who came in the shop. GJRT 6-7. Meth "cooker" Thomas Elrod testified that he asked questions with regard to how to make meth at the store, but the employees would not give him any information. GJRT 13.

drug "kingpin."

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE AMBIGUOUS, IF NOT CONFLICTING, STANDARDS IN UNITED STATES V. FALCONE, 311 U.S. 205 (1940), AND DIRECT SALES COMPANY V. UNITED STATES, 319 U.S. 703 (1943).

In United States v. Falcone, 311 U.S. 205 (1940), this Court unanimously ruled that one who simply sells materials with knowledge that they are intended for use in the production of illicit substances may not be convicted as a co-conspirator with the actual manufacturer of the substances, absent other factors showing an intent to join the conspiracy to manufacture. In other words, factors showing mere knowledge of the buyer's intended purpose, at least where the goods sold are not themselves controlled substances or subject to intense regulation, will not convert a sale into a conspiracy. As noted, the line drawn by this Court as to where "knowledge" ends and "intent to conspire" begins is by no means bright. As a result, persons such as petitioner operate their businesses at their peril

because, as this case demonstrates, a showing of clear knowledge of the purpose of the buyers of the chemicals has been translated through vicarious liability theories into an intent either conspire or aid and abet the buyers.

In Falcone, the defendants were in legitimate businesses as sugar jobbers, wholesale grocers who dealt in sugar and five gallon tin cans (among other things), and the proprietor of a yeast company. They sold these materials to members of a large scale conspiracy the object of which was the manufacture of "moonshine."

This Court held that such retail sales, even with knowledge of the intended use of the materials, is insufficient to make one a part of the conspiracy: "one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge." Id. 211. To justify a conviction of the retailers with the distillers, the Court held that "proof

must import an agreement or concert of action between buyer and seller, which is not present here." Id. at 207.

In Direct Sales Company v. United States, 319 U.S. 703 (1943), the defendant was a prescription drug mail order business registered as a drug manufacturer and wholesaler. Id. 704.[22] In holding there was sufficient evidence to convict the defendant of conspiracy to violate the Harrison Narcotic Act, a statute which prohibited the unlawful use of controlled

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[22] "The salient facts are that [Direct Sales Co.] sold morphine sulphate to Dr. Tate in such quantities, so frequently and over so long a period it must have known he could not dispense the amounts received in lawful practice and was therefore distributing the drug illegally. Not only so but it actively stimulated Tate's purchases." Id. 705. During the last two years of which the conspiracy was charged, the doctor ordered almost nothing but morphine. Id. 706.

"In 1936 the Bureau of Narcotics informed the petitioner it was being used as a source of supply by convicted physicians (footnote omitted). The same agent also warned that the average physician would order no more than 200 to 400 quarter-grain tablets annually (footnote omitted) and requested it to eliminate the listing of 5000 lots.... On one occasion in 1939, he ordered on one form 1000 half and 100 quarter grains. Petitioner sent him the 1000 and advised him to reorder the 100 on a separate order form. It attached to this letter a sticker printed in red suggesting anticipation of future needs and taking advantage of discounts offered." Id. at 707. [¶] "[A]lthough there were more than 1350 wholesale drug dealers in the United States from whom physicians might order narcotics about 27% of the 204 doctors convicted were petitioner's customers." Id. at 706, fn. 4.

substances,[23] the court found that the defendant corporation was encouraging and profiting by the buyer-doctor's illicit operations. Id. at 713.

> ...not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows that the buyer intends to use them unlawfully, will support a charge of conspiracy.... There may be circumstances in which the evidence of knowledge may be clear, yet the further step of finding the required intent may not be taken. Id. at 712.

The Court differentiated between articles of normal trade on one hand and narcotics and machine guns on the other arising from the "inherent capacity for harm and from the very fact they are restricted." This makes a difference in the quantity of proof required to show that the buyer will utilize the article unlawfully. "Additional facts, such as quantity sales, high-pressure sales methods, abnormal increases in the size of the buyer's purchases, *etc.*, which would be wholly innocuous

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[23] "It shall be unlawful for any person to obtain... drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession." Id. 706, fn. 3.

or not more than ground for suspicion in relation to unrestricted goods, may furnish conclusive evidence, in respect to restricted articles, that the seller knows the buyer has an illegal object or enterprise. Knowledge, equivocal and uncertain as to one becomes sure as to the other." Id. 713.

Direct Sales contrasted its facts with Falcone. "The Falcone Case creates no such sweeping insulation for sellers to known illicit users. That decision comes down merely to this, that one does not become a party to a conspiracy by aiding and abetting it, through sales and supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally." Id. at 709.

Here, the substances were not inherently harmful or controlled as in Direct Sales; it was stipulated that petitioner never received any funds from the methamphetamine operations of Quantum's customers other than what they paid for the purchase of the chemicals and glassware. Quantum never gave

credit to customers, and did not loan them money. Quantum employees were instructed not to give advice of chemical procedures relevant to the manufacture of methamphetamine. E.C.R. 41-45. These facts show no "stake in the venture" of the purchaser's manufacture of illegal drugs. The petitioner's business interest ended upon the sale of the chemicals and there was no evidence of further contact between the parties. All of the facts relied upon by the district court may well show knowledge by petitioner and his employees, but they do not show intent to join with the buyer's illegal purpose.[24]

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[24] The ramifications of holding a business responsible for the known or reasonably suspected uses of its goods by purchasers are dire. The first targets of such a powerful prosecutorial weapon will be the unconventional and the unpopular; thus, for example, owners of "head shops" which sell pipes and other paraphernalia will be prosecuted for the illicit use of their products by drug user buyers.

III.

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE GOVERNMENT MAY BRING PROSECUTION OF RETAIL CHEMICAL SUPPLIERS, AFTER HAVING DIRECT KNOWLEDGE FOR YEARS OF THE THEIR SALES ACTIVITIES TO DRUG MANUFACTURERS, AND THEN BE PERMITTED TO DENY THE DEFENDANT DISCOVERY OF GOVERNMENT DOCUMENTS RELATING TO THE LEGALITY OF SELLING PRECURSOR CHEMICALS FOR THE PRODUCTION OF METHAMPHETAMINE, OR DRUG ENFORCEMENT ADMINISTRATION ("DEA") REPORTS OF CONTACT BETWEEN DEA AGENTS AND PETITIONER'S STAFF WHICH COULD SHOW SPECIFIC RECOGNITION OR ADVISALS THAT SUCH SALES CONDUCT WAS NOT DEEMED ILLEGAL.

As part of his written pre-trial discovery motion, petitioner made the following offer of proof:

> Defendant Jerome Isodore Kahn contends that witnesses called by defendant at the time of a trial in the above matter would testify to the following facts:
>
> (A) Governmental Scheme Involving Precursor Chemicals
>
> In the late 1970's and into the 1980's, certain chemical compounds were obviously controlled. As controlled substances, various acts with regard to these chemical compounds were crimes. Other chemicals were reportable by either the federal, state, or local governments. By "reportable" it is meant that

the seller was under a legal obligation to report the sale of certain chemicals to local law enforcement. In order to comply with the "reporting" requirements, sellers were required to obtain certain information, such as identification, from a purchaser.

However, some chemicals were neither controlled nor reportable. Thus, the DEA implemented a program whereby they requested cooperation of chemical supply companies in identifying purchasers of certain chemicals. The program involved voluntary compliance by wholesalers and retailers in providing information to the DEA. Implicit in this program was the conclusion that there was nothing in any law that required companies to provide information to the DEA regarding the purchasers of chemicals.

To implement the program, the DEA sent out communications, usually by letter, with a "watch list" of chemicals. Indeed, some of the letters did contain the names of certain chemicals that were reportable to the federal government, but the remaining chemicals were listed to alert the seller to possible purchasers who would be "suspicious".

It was through this program that the DEA attempted to obtain information about the purchasers of certain chemicals. By making the program one of "voluntary compliance," an inference could be drawn that the sale of the chemicals was not illegal.

Included in the chemicals that were not controlled nor reportable in this time frame were ephedrine, hydriotic acid, and red phosphorous. In 1987 the sale of ephedrine became reportable to the County of San Diego. However, it was not reportable in certain other counties in California, including Los Angeles County. In April, 1987 ephedrine became reportable to the State of California. Sometime thereafter it became reportable to the federal government.

(B) Investigation of Retail Chemical Suppliers

In the early 1980's several companies were selling chemicals openly in the State of California. These companies were selling chemicals that were on the DEA "watch list" without complying with the request of the DEA to inform them about the purchasers. Among the companies so operating overtly were Chem Shed, Arc Distributing, Myriad Chemical, RJM Labs and Entropy.

In 1981 DEA chemist Alan Clark went to RJM Labs with another agent. He was able to see exactly what types of chemicals were being sold there. The proprietor told Clark that he was purchasing chemicals from suppliers and reselling them on the retail market. In 1981 the DEA had Special Agent Sherri Ackerman record a telephone call to RJM to determine if she could buy chemicals to make 2p2 [sic], a controlled substance. She went down a list of chemicals to see about their availability. Later she went to the store and purchased the chemicals that she

had ordered. While there, she obtained a list of other chemicals that were available, including four types of ephedrine.

In early 1985 the DEA conducted an undercover operation with two agents. They went to RJM on five separate occasions, purchasing chemicals and glassware with which to manufacture methamphetamine. The whole purpose of the operation was to develop evidence which included knowledge on the part of the employees at RJM that the purchasers were using the chemicals and glassware to manufacture methamphetamine.

After Entropy was purchased by defendant and renamed Quantum, DEA agents came into the store and familiarized themselves with the types of chemicals and glassware that were being sold openly and overtly by Quantum.

Prior to the time that the complaint was issued against defendant Kahn, at no time was there any directive given to retailers that the sale of such precursor chemicals was illegal. No law enforcement authorities ever threatened criminal liability for selling these particular items.

In late 1985 a local newspaper[25] in San

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[25] In the January 17, 1986 edition of the **San Diego Tribune**, Agent D'Ulisse was quoted as stating: "Most responsible chemical companies won't sell ephedrine because there is no legitimate chemical use for it. But other places sell it legally. You can walk in, slip them a note and get everything you want to make it."

Diego ran a series of articles on how to manufacture methamphetamine. The articles included information about the chemicals and glassware needed, as well as the chemical processes to be utilized in producing "crystal." Shortly thereafter, an investigative news team from a local television station sent a camera crew and a reporter to retail outlets in San Diego, including, for example, RJM Labs. The television story showed how easy it was to purchase chemicals and glassware.

As an adjunct to the television story, Ron D'Ulisse, Special Agent with the DEA, acting as the public information officer for the local DEA office was interviewed by the television station. With reference to the sale of the precursor chemicals and glassware by these retailers, D'Ulisse stated: "What they are doing is immoral." Implicit in using the term "immoral" was an inference that they were operating within the letter of the law, although contrary to the spirit of the law.

(C) Advice of the Legality of the Sales of Precursor Chemicals

Perry Miller [petitioner's partner] and defendant Kahn purchased Entropy and renamed the company Quantum Labs. After the purchase, Perry Miller had a conversation with Ron D'Ulisse of the DEA. During the course of that conversation, D'Ulisse told Miller that the sales of precursor chemicals was not illegal. Miller then relayed that information to defendant Kahn.

Kahn considered the information to be valid statement of the law. He analyzed what was evident: (1) First, numerous chemical retailers were selling precursor chemicals without any criminal liability. (2) The sales were overt and open, and not clandestine in any way. (3) The sales had been taking place, in some instances, for a prolonged period of time. For example, RJM Labs had been doing business for at least 6 years without being prosecuted. (4) The sales of the chemicals were like the sales of narcotics paraphernalia by "head shops," the sales of metals by coin shops to customers sequestering untaxed monies, and the sales of guns to unsavory characters.

Defendant Kahn further confirmed the legality by seeking advice from various sources on the matter. Although the seeking of the advice from attorneys could form a complete and separate defense to criminal charges, Kahn's actions in this regard are set forth, not for that purpose, but to explain why he was led to believe by Miller's statement to him and the absence of criminal charges against anyone that his actions were not criminal.

Even if there is a failure of proof on whether D'Ulisse told Miller that the sales were not unlawful, it is defendant Kahn's position that the failure of the government to prosecute anyone for the sale of these precursor chemicals for such a long period of time led him to conclude that his conduct was lawful. The absence of any attempt by the government to fix

criminal liability on such retailers over such a period of time is the "functional equivalent" of an affirmative act on the part of the government that should preclude prosecution of defendant Kahn.

Thus, Kahn was advised by attorneys John Chester, Doug Jennings, Howard Frank, Juanita Brooks and Marty Keach. No one ever told Kahn that the sales were illegal, and that he should stop them as he was violating the law by selling the chemicals. In fact, Chester expressed his opinion positively that the sales were legal.

Doug Jennings insisted that his participation in the business of the corporation would not take place unless he were completely satisfied that everything was being done lawfully. Although Howard Frank was not sufficiently clear on the issue, Juanita Brooks related analogous situations from which the inference was drawn that the sales were lawful.

At some point in time, defendant Kahn employed James Ingegno, who at the time was a police officer with the Oceanside Police Department. Defendant Kahn believed that Ingegno would not have associated himself with defendant Kahn in the business unless Ingegno was completely satisfied that the business were lawful.

Bob Poppleton and his wife, devout members of the Church of Latter Day Saints, became associated with the business. Again, it

> was concluded that they would not have participated if there were any suggestions that the business were [sic] unlawful. E.C.R. 20-25.

The discovery issue was thus simple. For years the government had been aware of petitioner's legitimate business activities as a chemical supplier. No charges were brought against him or other suppliers prior to 1988. Indeed, the Government was conceding in the Ninth Circuit that the sale of chemicals and glassware was perfectly legal,[26] and petitioner was not warned of the serious charges he faced if it could be proved he knowingly supplied chemicals to persons who would used them to manufacture methamphetamine. Moreover, petitioner proffered that both publicly and privately, he had been informed by the DEA that it was no crime to supply precursor chemicals to buyers even when the store owner knew,

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[26] In United States v. Howard, 828 F.2d 552 (9th Cir. 1987), law enforcement was keeping surveillance over RJM laboratories, a chemical supply house "where person on previous occasions have purchased chemicals for clandestine methamphetamine laboratories." Id. at 554. RJM labs was the supply house involved in the case of United States v. Miskinis, 966 F.2d 1263 (9th Cir. 1992). During argument of the Howard case, the Government conceded: "that RJM legally sells chemicals and glassware to third parties." 828 F.2d 555.

or should have known, the intentions of the buyers.

Petitioner sought discovery of: (A) internal government memoranda relating to the legality of selling precursor chemicals for the production of methamphetamine, and (B) Drug Enforcement Administration ("DEA") reports on his companies, and contacts between DEA agents and his employees.

The discovery was relevant to a defense of reliance on official statements that his conduct was legal, a defense which both this court (*see* United States v. Pennsylvania Industrial Chemical Corporation, 411 U.S. 655 (1973)), and the court below has recognized (*see, e.g.*, United States v. Clegg, 846 F.2d. 1221 (9th Cir. 1988). *See also* F.R.CR.P. 12.3 (Notice of the Defense Based Upon Public Authority.[27] On the facts

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[27] Under the rule, in giving pre-trial notice of the defense, the defendant must identify the law enforcement agents upon whom he relies and the time period of the alleged authorization. This, in turn, triggers a discovery reply obligation by the Government within ten days of receipt. The Government may demand in its reply the names of all witnesses supporting this defense; within seven days the defense must respond, but can demand in turn all of the Government witnesses who will oppose the defense. Failure to comply can result in the exclusion

of this case, petitioner clearly made a plausible case for discovery based on this defense.

In rejecting the request for internal government documents on the issue of the legality of petitioner's conduct, the court below states:

> There was no abuse of discretion in denying Kahn's discovery motion relating to internal governmental memoranda. Kahn does not claim he ever read or possessed any internal governmental memoranda relating to the legality of selling precursor chemicals. Accordingly, the memoranda are irrelevant to the claim that he relied on an official endorsement of selling the precursor chemicals, and so are not discoverable. App. A-3.

The court's view of the relevance of the documents is myopic. Obviously, petitioner never read such internal government memoranda; that was not the purpose of his request. The existence of such documents, particularly those questioning whether there was a crime being committed, would support the petitioner's position than a DEA agent actually

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of a witness except if it is the defendant.

informed his business partner, Mr. Miller, that the supply of such chemicals was not prohibited under the law. This was not mere theory. During the years of arresting methamphetamine manufacturers in San Diego County, there were no arrests of the chemical suppliers despite the clear knowledge by the authorities of the source of the chemicals to the manufacturers. This is because the DEA was of the position that such sales were legal. In the January 17, 1986 edition of the **San Diego Tribune**, DEA Agent D'Ulisse was quoted as stating: "Most responsible chemical companies won't sell ephedrine because there is no legitimate chemical use for it. But other places sell it legally. You can walk in, slip them a note and get everything you want to make it."

During a public relations televised interview on November 3, 1986, DEA Agent Ron D'Ulisse stated to a KFMB-TV San Diego newscaster that, "There is a difference between illegal and immoral, and what they're doing is obviously immoral - it's unconscionable." This statement was

made during the televised study by the station of how easy it was to buy precursor chemicals. The commentator said, "Some say it's simple [to make methamphetamine] because chemical companies are barely towing the line of the law."[28]

Here were public statements by a knowledgeable DEA Agent who not only did not claim that the conduct of the supplier businesses was illegal (just "immoral") but in fact stated it was legal. Indeed, he had been quoted in the newspapers as stating such sales were perfectly legal. This was in keeping with the petitioner's proffer that D'Ulisse stated the same thing to one of his own employees.

The court below states that such a statement is of no great moment because: "It is once removed from the target[29]

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[28] This video was played to the panel below during oral argument after advanced permission of the court was sought by petitioner and granted. As noted, the Government has conceded in 1987 in United States v. Howard, 828 F.2d 552, 555 (9th Cir. 1987), that it was not a crime to sell such chemicals and glassware.

[29] There is irony in holding petitioner liable for CCE because of the conduct of his business associates in selling precursors to manufacturers and at the same time down-playing the relevance of an alleged affirmative statement to one of those employees that the sales

and does not demonstrate that Kahn was affirmatively misled into believing he could knowingly supply chemicals to persons illegally manufacturing methamphetamine without breaking the law." App. A, 5-6. As the previous argument makes clear, if D'Ulisse told suppliers that such sales were not illegal in themselves, then under Falcone and Direct Sales, the mere fact that the seller knows of the intended purpose of the purchasers does not make the conduct illegal.

The Government evidently decided in 1988 to begin prosecutions against the retail chemical suppliers such as petitioner. Petitioner, in support of his defense of authorization, was at least entitled to discovery of information

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of such precursors was not illegal. If petitioner is to be held accountable for the acts of his employees in their knowingly selling precursors to drug manufacturers, then evidence that they believed their conduct legal based on representations from the government is highly relevant. Further, the employment status of the associate and the assuring statement of the agent are circumstantial pieces of evidence which arguably would show both that the employees believed their own conduct perfectly legal and that they communicated the DEA agent's comment to the petitioner. This evidence would not only support an estoppel defense, but also support a lack of *mens rea* for any offense.

that prior the point in 1988 when prosecutions were authorized, that the Government itself believed the conduct of knowing supply of precursors was not proscribed as relevant to show that its agents so communicated that information to petitioner's employees. While the court below states that the charges against petitioner "... alleged that Kahn had knowingly and intentionally participated in the illegal manufacture of drugs, not just selling of precursors" (App. A-4), that begs the issue because the evidence used to convict petitioner were the sales by his staff of precursors to persons who used them to manufacture methamphetamine. Further, Falcone makes it clear that mere knowing sales non-controlled precursor substances does not in itself make one a conspirator to the buyer's subsequent illegal use of the substances sold. Also, DEA Agent D'Ulisse's public statements indicated that the Government believed that the knowing sales of such precursors substances to a drug manufacturer, although "immoral," was not illegal.

The opinion below notes that Agent D'Ulisse, without looking at his files to look for the requested documents, simply denied stating to a person associated with petitioner's business that the sale of precursors was legal. In fact, however, he declared that he believed a person working at petitioner's business was told of "potential criminal liability for individuals or businesses involved in the sales of precursor chemicals commonly used in the clandestine manufacturing of methamphetamine . . . ." App. A-5. This is an interesting turn-about from his previous public comments both in the newspapers and in a televised interview stating that the mere sales of such chemicals from a chemical supply was not illegal.

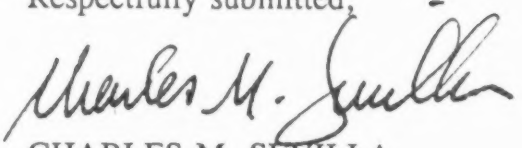
Petitioner was entitled to the Government's internal documents evidencing it's belief that the mere knowing sales of precursors was not illegal and any documents evidencing direct or indirect communications of such belief to petitioner or his staff.

CONCLUSION

For the above reasons, this petition for certiorari should be granted.

Dated: January 6, 1993

Respectfully submitted,



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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	FILED OCT 20 1992 CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS
Plaintiff-Appellee,	
	No. 91-50589
v.	D.C.No.CR-89-0460-E-01
JEROME ISODORE KAHN,	
Defendant-Appellant	**MEMORANDUM**[1]

Appeal from the United States District Court
for the Southern District of California
William B. Enright, District Judge Presiding

Argued and Submitted August 20, 1992
Pasadena, California

Before: NORRIS, REINHARDT, and TROTT, Circuit Judges.

Jerome Isodore Kahn appeals his conviction for engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848 (1988) (the "kingpin" statute). Kahn now claims (I) the district court erred in denying his request for discovery of

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

materials relevant to an "equitable estoppel" defense, and (II) he did not engage in a continuing criminal enterprise. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I.

Kahn disputes the denial of his motions for discovery, claiming he is entitled to inspect (A) internal government memoranda relating to the legality of selling precursor chemicals for the production of methamphetamine, and (B) Drug Enforcement Administration ("DEA") reports on his companies, or on contact between DEA agents and his employees. He claims the discovery is relevant to a defense of reliance on official statements that his conduct was legal. This defense is viable, United States v. Clegg, 846 F.2d 1221, 1223-24 (9th Cir. 1988) (per curiam) (Clegg II), and evidence relevant to it is discoverable, Brady v. Maryland, 373 U.S. 83 (1973).

We review for abuse of discretion the denial of Kahn's motions. United States v. Clegg, 740 F.2d 16, 18 (9th Cir. 1984) (Clegg I). We reject Kahn's analogy between discovery requests and jury instructions, and so reject his suggestion that we

review de novo the district court's decision.

There was no abuse of discretion in denying Kahn's discovery motion relating to internal governmental memoranda. Kahn does not claim he ever read or possessed any internal governmental memoranda relating to the legality of selling precursor chemicals. Accordingly, the memoranda are irrelevant to the claim that he relied on an official endorsement of selling the precursor chemicals, and so are not discoverable. See Clegg II, 846 F.2d at 1224 ("In each of these [cited cases], it is clear that the actor actually relied on an official statement that certain conduct was not unlawful") (Skopil, J., dissenting); United States v. Dupuy, 760 F.2d 1492, 1501 & n.3 (9th Cir. 1985) ("Materiality is the touchstone in the determination of whether evidence qualifies as Brady material.")[2]

We also conclude there was no abuse of discretion with respect to Kahn's motion to discover reports on conversations

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[2] We reject Kahn's claim that the government's initial failure to prosecute him was "the 'functional equivalent of affirmative, direct communication . . . that misled him into believing the sales were legal," and so we need not consider whether the documents were relevant to that claim.

between DEA Special Agent Ron D'Ullisse, and Kahn's former partner, Perry Miller. According to Kahn, Special Agent D'Ullisse told Miller that selling precursor chemicals was "not illegal"; Miller, now deceased, cannot confirm or deny Kahn's claim. While this evidence is marginally related to Kahn's asserted defense, we cannot say the district court abused its discretion in denying his discovery motion.

Kahn was not charged with the mere selling of chemicals. He was charged with engaging in a continuing criminal enterprise (Count I) and conspiracy to manufacture methamphetamine (Count II). Both charges alleged that Kahn had knowingly and intentionally participated in the illegal manufacture of drugs, not just selling of precursors.

This distinction renders imperfect Kahn's analogy to Clegg II. In Clegg II, the government had apparently given Clegg permission to do precisely that for which he was indicted. Here, Kahn does not contend the government told him it was legal knowingly to supply precursor chemicals to illegal manufacturers of methamphetamine or that it was legal

knowingly to assist them in their illegal and clandestine enterprises. All Kahn claims is that his deceased partner was told by Agent D'Ullissse that the "sales of precursor chemicals was not illegal." This distinction also applies to the other cases cited by Kahn: Raley v. Ohio, 360 U.S. 423 (1959); Cox v. Louisiana, 379 U.S. 559 (1965); United States v. Penn. Indus. Chem. Corp., 411 U.S. 655 (1973); United States v. Talmadge, 829 F.2d 767 (9th Cir. 1987); United States v. Albertini, 830 F.2d 985 (9th Cir. 1987). In each, citizens claimed they had been affirmatively misled into believing that conduct they had subsequently engaged in was legal when it was not.

This waters down substantially the materiality of any alleged memo containing the information sought by Kahn because the information itself falls short of providing a basis for estopping the government from prosecuting Kahn for the precise charges contained in the Information. It is once removed from the target and does not demonstrate that Kahn was affirmatively misled into believing he could knowingly supply chemicals to persons illegally manufacturing

methamphetamine without breaking the law.

Moreover, the district court was confronted with a declaration from Agent D'Ullissse in which he denied categorically that he ever made such a statement to Miller. To the contrary, D'Ullisse asserted he had advised Miller of the "potential criminal liability for individuals or businesses involved in the sales of precursor chemicals commonly used in the clandestine manufacturing of methamphetamine . . . ." Implicit in this denial is that the information sought by Kahn simply did not exist, either in a memo or elsewhere. Indeed, this is the position taken by the government both in its written opposition to the discovery request and during the hearing at which the discovery motion was argued. The government repeatedly stated that after extensive investigation, it did not "believe any such memos or legal opinions exist." It would have been more direct for Agent D'Ullisse explicitly to have stated in his declaration that he had searched the relevant files and found no memo containing the information sought, but this lack of perfection on his response is not fatal to the district courts

determination. Under the circumstances, and given the deferential standard of review applied to this issue, we do not conclude that the district court abused its discretion in denying Kahn's motion and ruling against him on the issue of estoppel.

II

Kahn also claims he improperly was convicted of operating a continuing criminal enterprise, in violation of 21 U.S.C. § 848, the kingpin statute. That statute has the following elements:

> [A] person is engaged in a continuing criminal enterprise if –
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony [sic], and
>
> (2) such violation is a part of a continuing series of violations of this chapter or subchapter II of this chapter –
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person derives substantial income or resources.

21 U.S.C. § 848(c).

The stipulated facts in this case reveal (and Kahn concedes) that Kahn supervised five or more persons in an operation from which he obtained substantial income. See id. § 848(c)(2)(A)-(B). The dispositive questions are (1) whether Kahn "violat[ed]" any felony provision of the relevant controlled substances laws, and (2) whether the violation was "part of a continuing series of violations" of those laws. See id. § 848(c)(1)-(2).

The answers to these dispositive questions are provided by the recent case of United States v. Miskinis, No. 90-50025, slip op. 3867 (9th Cir. Apr. 10, 1992). In Miskinis, as here,

> [b]y the sum of his actions -- making the precursor chemicals for methamphetamine available . . . with the knowledge that they would be used for an illegal purpose, and taking affirmative steps to enable . . . customers to conceal their identity from DEA investigators, to evade surveillance, and to avoid the applicable reporting requirements -- [the defendant] significantly aided and abetted . . . manufacturer[s] of methamphetamine . . . .
>
> . . . . We . . . hold that section 848 may be applied to one whose criminal conduct consists solely of aiding and abetting the criminal conduct

> of others, if that person is otherwise a kingpin in his own right, and if the criminal conduct aided or abetted would itself qualify under that section.

Id. at 3876.

The stipulated facts in this case track those in Miskinis. On several different occasions, Kahn aided and abetted the manufacturing of methamphetamine, see 18 U.S.C. § 2 (1988),[3]

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[3] The parties stipulated that the case would be disposed of on the basis of a Superseding Information rather than an indictment. The Information alleged as Kahn's predicate acts the violation of "various felony provisions of the Controlled Substances Act . . . including but not limited to title 21, United States Code, Sections 841(a)(1) and 846 . . . ." The Information does not mention 18 U.S.C. § 2. However, the Information does allege several specific acts which are aiding and abetting offenses. Accordingly, aiding and abetting is a viable theory of predicate liability in this case. See United States v. Aiello, 864 F.2d 257, 265 (2d Cir. 1988) ("the government need not specifically plead, let alone obtain convictions on, any of the predicate offenses; it simply must prove at trial a continuing series of at least three felony offenses."), cited in Miskinis, slip op. at 3877.

Further, we note that in the disposition agreement accompanying the Information, the parties agreed that the case involved the issue of "whether defendant can be liable where his liability is predicated on his aiding and abetting others in violating federal laws regarding controlled substances . . . ." Both sides litigated the aiding and abetting issue in the court below, and both sides have briefed it here. Indeed, Kahn argues, "[t]he whole theory of criminal liability was predicated upon [Kahn's] assistance to those who actually violated the narcotics laws." Kahn had sufficient notice that aiding and abetting was a possible predicate act. See United States v.

an offense which qualifies under the kingpin statute. He is a kingpin in his own right, and his conviction therefore is

AFFIRMED.

Martin, 783 F.2d 1449, 1452-53 (9th Cir. 1986), disapproved on other grounds, Schmuck v. United States, 489 U.S. 705 (1989).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	Criminal
	)	No. 89-0460-E
	)	
v.	)	
	)	
JEROME ISODORE KAHN,	)	
	)	
Defendant	)	MEMORANDUM
	)	DECISION
	)	AND ORDER

BACKGROUND

Jerome Kahn and Victoria Humphrey-Kahn are charged in a four count superseding information. Count 1 charges Jerome with continuing criminal enterprise (CCE). 21 U.S.C. § 848(c). The Rule 29 motion attacks this count on several legal grounds. Count 2 charges Jerome and Victoria with conspiracy to manufacture methamphetamine. 21 U.S.C. § 841(a)(1). Under the disposition agreement, this conspiracy count is included only as it is necessary to support the CCE charge in count 1. The parties ask that no sentence be imposed on count 2. Count 3 charges Jerome and Victoria with conspiracy to

structure monetary transactions. 31 U.S.C. § 5324(3) & 5322(b). Jerome has previously entered a guilty plea to this count. Count 4 charges Jerome with murder for hire. 18 U.S.C. § 1958(a). Pursuant to the terms of the plea agreement, the government dismissed the counts against Victoria Humphrey-Kahn (counts 2 and 3), and count 4 against Jerome Kahn.

This case came before the court for a stipulated facts trial on May 20, 1991. The Stipulated Facts and Agreement were filed on March 28, 1991. In the Disposition Agreement (filed February 19, 1991), defendant Jerome Kahn identifies specific legal challenges to the continuing criminal enterprise charge. Those issues are briefed in Kahn's Motion for Judgment of Acquittal. Fed. R. Crim. P. 29. The court has reviewed those papers and the government's response, and considered the argument of counsel.

In an oral ruling on May 23, 1991, the court denied the Rule 29 motion, and found Kahn guilty on counts 1 (continuing criminal enterprise) and 2 (conspiracy to manufacture methamphetamine). In this Memorandum Decision, the court

details its reasons for denying the motion for judgment of acquittal.

STIPULATED FACTS

The parties filed a statement of stipulated facts as to count 1 (CCE). They also submitted the Grand Jury testimony of the various witnesses against Kahn, and the court has read this testimony. The Stipulated Facts are based on evidence taken by the Grand Jury.

Kahn bought Entropy Labs in February 1985 and changed the name to Quantum Laboratory Supply. There were stores in various cities. The main store, in Carlsbad, sold very large quantities of precursor chemicals (including ephedrine, hydriotic acid, and red phosphorous) and glassware for the clandestine manufacturing of methamphetamine.

Kahn occupied the position of organizer, supervisor, and manager of the business. Kahn acted in concert with at least five other persons in his position as organizer, supervisor, and manager. Kahn derived substantial income and resources from the operation of the business (about 3 to 4 million dollars in

profit).

With regard to the majority of Quantum's customers, all of the employees and Kahn himself had reasonable cause to believe that the customers were buying the chemicals and glassware in order to illegally manufacture methamphetamine. Some customers were regular purchasers. The employees and customers used slang terms to refer to the precursor chemicals. The employees, in response to questions, informed customers how to manufacture methamphetamine is [sic] a safer or more expeditious manner.

In 1986, San Diego County enacted reporting requirements and a waiting period for the purchase of ephedrine. As a result, the Carlsbad store directed customers to the Orange County store. In 1987, the State of California enacted the reporting requirements. Customers were then referred to Kahn's warehouse in Nevada. When agents seized and searched the Nevada warehouse, Kahn opened a warehouse in Utah. He also stored large quantities of ephedrine in Utah with the expectation that the value would increase when

it became illegal.

Kahn was a fugitive from May 20, 1988 until his arrest in April 1990.

DISCUSSION

In the Rule 29 motion, Kahn challenges the continuing criminal enterprise count on two major grounds. First, he asserts that the facts are legally insufficient to support the CCE charge against him. Second, he maintains that a CCE charge cannot be predicated upon accessorial liability. The government opposes the Motion.

CCE is also known as the kingpin statute. 21 U.S.C. § 848(c). It requires five elements: (1) a violation of the drug laws; (2) such violation is part of a continuing series of violations; (3) undertaken by the defendant in concert with five or more persons; (4) where the defendant occupies a position of organizer, supervisor, or manager; and (5) the defendant obtains substantial income. Kahn's motion attacks the first element, that is, whether there was a violation of the drug laws on the stipulated facts. As a consequence, Kahn asserts that

the government has not established a continuing series of violations. The parties do not dispute that Kahn acted in concert with five or more persons, that he occupied a position of supervisor, organizer, and manager, and that he obtained substantial income from the activities.

(1) Facts to Support the CCE Charge in Count 1

First, Kahn argues that the facts are legally insufficient to support the charge of any crime against him. Kahn relies on United States v. Falcone, 311 U.S. 205 (1940). In Falcone, the defendant sold large quantities of sugar, yeast, and cans to customers who used the materials to manufacture [sic] illegal alcohol. The customers were convicted of conspiracy to violate the revenue laws by operating various illegal stills. The sellers appealed their conviction for conspiracy. The question for the Supreme Court was whether "one who sells materials with knowledge that they are intended for use or will be used in the production of illicit distilled spirits may be convicted as a co-conspirator with a distiller who conspired with others to distill the spirits in violation of the revenue laws." Id. at 206. Based

on the evidence, the Court held that "[t]hose having no knowledge of the conspiracy are not conspirators," and "one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge." Id. at 210-11.

Kahn asserts that Falcone is controlling because his case is similar factually. He sold ephedrine, hydriotic acid, and red phosphorous (comparable to the sugar and yeast in Falcone) and glassware (analogous to the cans) to customers who used the materials to manufacture illegal drugs (like the distillers who manufactured illegal alcohol). And while Kahn knew, or had reasonable cause to believe, that the customers would use the materials for an illegal purpose (like the seller in Falcone), Kahn cannot be convicted of conspiring with the customers.

The government relies on the case Direct Sales Company v. United States, 319 U.S. 703 (1943), which followed and clarified the ruling in Falcone. In Direct Sales, the

defendant, a corporation, sold large quantities of prescription drugs to doctors; the doctors, in turn sold the drugs illegally.

The Falcone and Direct Sales cases concern the availability of evidence to support the required mens rea element of the crime of conspiracy. The mens rea element for conspiracy is intent, that is, an intent to achieve the objective of the agreement. Intent is a more culpable state of mind that [sic] knowledge. One variable in determining whether the defendant has the requisite intent is the nature of the materials. If the materials are innocent in themselves, like sugar and yeast, then more proof is required to convict the seller as a co-conspirator with the buyer. Falcone, 311 U.S. at 208 ("the evidence on which the Government relies does not do more than show knowledge by [defendant] that the materials would be used for illicit distilling."). If the items are regulated, then a conviction is possible with less proof. Direct Sales, 319 U.S. at 711 ("The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns, and such restricted commodities, on the other, arising from the

latters' inherent capacity for harm and from the very fact they are restricted, makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully."). The Direct Sales Court noted that "not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy." Id. at 712. "This may be true, for instance, of single or casual transactions, not amounting to a course of business, regular, sustained and prolonged, and involving nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase, for whatever end." Id. at 712 n.8.

The nature of the materials is only one element in determining the defendant's state of mind. In evaluating the quantity of proof, the Direct Sales Court noted that "[a]dditional facts, such as quantity of sales, high pressure sales methods, abnormal increases in the size of the buyer's purchases, etc., which would be wholly innocuous or not more than ground for

suspicion in relation to unrestricted goods, may furnish conclusive evidence, in respect to restricted articles, that the seller knows the buyer has an illegal object and enterprise." Id. at 711. The seller's knowledge, if sure and unequivocal, rises to the level of intent necessary to support the conspiracy conviction. Id. at 711-712.

Both cases involve a similar situation to the one involving Kahn, that is, a seller supplies materials to customers and the seller knows that the customer will use the materials for an illegal purpose. In Falcone, the Court found that the evidence showed the defendant "knew" of the objective, but the evidence did not rise to a level of "intent." By contrast, due to the nature of the materials in Direct Sales, the Court found that the evidence supported a finding of intent by the seller, thus the seller was guilty of conspiracy. Thus, Falcone involved a failure of proof by the government. In Direct Sales, the defendant asserted that the Falcone ruling established "that one who sells to another with knowledge that the buyer will use the article for an illegal purpose cannot, under any circumstances, be found

guilty of conspiracy with the buyer to further his illegal end." The Court in Direct Sales flatly rejected the suggestion: "The Falcone case creates no such sweeping insulation for sellers to known illicit users." Consequently, the question for this court is whether the evidence supports a finding of knowledge (in which case Falcone is controlling), or whether the evidence supports a finding of intent (in which case Direct Sales is controlling).

The court agrees with the government that Kahn's case is more like Direct Sales, than it is like Falcone. To an extent, Kahn is correct that the materials were innocent at the time and place in which the sales took place. During the first year of business 1985), the sales in San Diego were unregulated because the San Diego County reporting requirement did not go into effect until 1986. Once that reporting requirement took effect, Kahn moved the sales to Orange County, where no reporting requirement existed. When the statewide reporting requirements took effect in 1987, Kahn moved the sales to Nevada. Thus, at the time and place of the sales, the chemicals were not subject to regulation, and therefore, similar to the

sugar and yeast in Falcone. Nonetheless, other facts support a finding of intent on Kahn's part.

First, the government notes the evidence that the primary item sold by Kahn--ephedrine--has virtually no legitimate use, other than the manufacturing of nasal decongestants. This factor distinguishes ephedrine from sugar and yeast in Falcone. Even if ephedrine were unregulated at the time of sale, it was neither entirely an item of "free trade" nor entirely innocent. Aside from the nature of the materials, additional facts can push a case over the line from knowledge to intent. For instance, even assuming that the chemicals were unregulated at the time and place of the sales, the quantity of sales to regular customers supports a finding of intent. Direct Sales, 319 U.S. at 712 n.8 ("regular, sustained and prolonged" transactions). The stipulated facts state that literally hundreds of separate batches of methamphetamine were manufactured by individuals after acquiring their chemicals and glassware from Kahn's various stores.

In addition to the large quantities and regular customers,

as the government notes, the nature of the individuals purchasing the chemicals and glassware put Kahn on notice of the illegal purpose of the purchases. That is, some of the employees testified at Grand Jury that the customers were unsavory or looked like drug dealers.

Also, as noted by the government, during Kahn's operation of the business, numerous restrictions were placed on the sale of ephedrine, and Kahn took specific and directed measures to avoid those reporting requirements. For example, Kahn relocated his stores to other areas of California, and later out-of-state to avoid the reporting requirements. Also, according to the stipulated facts, in 1987 Kahn was concerned that law enforcement authorities were looking at the Quantum operation, and he took steps to place other individuals on the title to the various stores. Further efforts were taken to establish a shell corporation out of Mexico which would appear to be the owner of the various stores. Finally, anticipating that ephedrine would become illegal, Kahn stored large quantities of the chemical at a warehouse in Utah, in the hopes of a ten-fold increase in its

value.

Additionally, Kahn and the employees used slang terminology to refer to the chemicals, further evincing more than a suspicion of the buyer's intended use. For example, customers would order a "fifty liter set up" to refer to the glassware needed to manufacture fifty-liter quantities of methamphetamine. Also, the chemicals would be referred to as "white, red, and acid" as slang terms for ephedrine, red phosphorous, and hydriotic acid, respectively.

Also, his employees instructed and advised customers on the use of the equipment, that is, employees would respond to questions by customers relating to glassware or equipment, which would enable the customer to manufacturer [sic] methamphetamine in a more expeditious or safe manner.

In addition, from a review of the grand jury transcripts, the stores discounted the price of the chemicals if they were purchased in large quantities. (See, e.g., Grand Jury Transcript of Sherry Lee Cape, at 28-29). This is similar to he defendant's activities in Direct Sales, where the seller offered fifty percent

discounts on narcotics in large lots, thereby pushing quantity sells. Direct Sales, 319 U.S. at 706, 712 (high pressure sales techniques, mass advertising, and bargain discounts for restricted goods creates black markets and increases illegal demand and consumption). In turn, these discounts and the large profits, support a finding that Kahn had "a stake in the venture," another relevant factor to the question of conspiracy. Id. at 713 (defendant seller's "stake here was in making the profits which [he] knew could come only from [his] encouragement of [the customer's] illicit operations.").

Therefore, the facts support the CCE charge. That is, because each sale made with reasonable cause to believe the purchases would be used in the illegal manufacture of methamphetamine, formed a separate conspiracy, these sales violated Title 21. Similarly the hundreds of sales/violations constitute a "continuing series of violations" under the statute.

(2) The CCE Charge and Aiding and Abetting

Kahn's next argument assumes that the individual sales to customers who manufactured methamphetamine do not form

conspiracies, therefore Kahn has not actually committed a violation of the drug laws. As discussed above, the court does not share Kahn's assumption, and this aspect of his argument fails for the reasons discussed above. In the alternative, Kahn notes that the government's theory of liability on the CCE charge is that the sales were acts of aiding and abetting the illegal manufacture of methamphetamine. Kahn contends that the CCE charge cannot be predicated upon accessorial liability. In support of that assertion, Kahn cites a Second Circuit case, United States v. Amen, 831 F.2d 373, 381-82 (2d Cir. 1987), cert. denied sub nom. Abbamonte v. United States, 485 U.S. 1021 (1988), holding that one cannot be convicted of a violation of the kingpin statute on an aiding and abetting theory.

The government correctly points out, however, Kahn is not charged with aiding and abetting another in the operation of a continuing criminal enterprise. He is charged as the kingpin of the enterprise. Thus, Kahn's conviction under § 848 does not violate the rule that the continuing criminal enterprise statute cannot be applied to one who simply aids and abets the

kingpin. See United States v. Ambrose, 740 F.2d 505 (7th Cir. 1984), overruled in part, United States v. Pino-Perez, 870 F.2d 1230 (7th Cir.) (en banc), cert. denied, 110 S.Ct. 260 (1989). For example, Victoria could not be convicted under the CCE statute for assisting Jerome in the conduct of the business because she would simply be an employee of the kingpin. But here, Kahn is the kingpin, thus his situation differs from that presented in Ambrose.

Moreover, the court finds that Aiello is more persuasive on these facts, and that Kahn can be convicted under the CCE statute even if the predicate offenses for this crime were aiding and abetting others to commit drug violations (by selling the necessary materials to those who manufactured methamphetamine). United States v. Aiello, 864 F.2d 257 (2d Cir. 1988). In Aiello, the Second Circuit explained that kingpins are not shielded "from CCE liability solely because they are convicted as aiders and abettors rather than as principals with regard to the predicate crimes. We therefore hold that a drug felony violation based upon aiding and abetting may qualify as

a 'series' predicate where, as here, the aider and abettor is a kingpin." Id. at 264. Similarly, the predicate offenses for Kahn's CCE charge can be the aiding and abetting of others, his customers, to violate the narcotics laws.

(3) Superceding Information

Although it is unclear if this is a separate attack, Kahn's papers allege that the superseding information fails to charge an offense in count 1. Kahn's argument is that there is only one conspiracy in this case and that the CCE statute requires a continuing series of violations. The single conspiracy, according to Kahn, was between Kahn and his employees to sell chemicals and glassware. He argues that the sales to individual customers were merely overt acts of that single conspiracy.

However, as shown by the discussion of the Direct Sales case, Kahn is also a co-conspirator with the customers; accordingly, the information does charge a violation of the continuing criminal enterprise statute. The information alleges all of the elements of the offense. And the court rejects Kahn's

challenge to the superseding information.

CONCLUSION

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at hearing, and for the reasons set forth above, the court hereby denies Jerome Kahn's motion for judgment of acquittal.

DATED: June 4, 1991.

_____

WILLIAM B. ENRIGHT, Judge
United States District Court

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff v. JEROME ISODORE KAHN, Defendant	) Criminal No.89-0460-E) PROPOSED FINDINGS OF FACT PURSUANT TO RULE 23(C), F.R.CR.P.

Pursuant to the court's order of May 23, 1991 and consistent with the verdicts rendered by the court on May 23, 1991 the government submits the following proposed findings

of fact.

1. Between and during 1985-1987 defendant Kahn was the principal owner and operator of a number of retail chemical supply businesses which operated under the name of Quantum Laboratory Supply and related names. These businesses operated in San Diego, Orange and Riverside counties, as well as Henderson, Nevada.

2. The primary items sold by these businesses were the precursor chemicals, such as ephedrine, hydriotic acid and red phosphorous, along with glassware, commonly used in the clandestine manufacturing of methamphetamine.

3. During and throughout 1985-1987 defendant Kahn was the supervisor and manager of numerous employees with whom he acted in concert, including Ruta Kahn, Tina Louise Wachtel, Kathleen McCurdy, Robert Poppleton, James Ingegno, Grace Chaney, Bruce Strickler, Denise Huber, Sherry Cape, Robert Schi, Peggy Lewis, and co-defendant Victoria Humphries Kahn. Most of these individuals were directly involved in the daily operations at the assorted Quantum stores, including the

direct retail sales of the various chemicals and glassware.

4. Defendant Kahn, along with his employees were aware that the majority of the customers used the chemicals and glassware purchased from Quantum to illegally manufacture methamphetamine.

5. The various customers used the chemicals and glassware purchased from defendant Kahn's businesses to manufacture literally hundreds of batches of methamphetamine.

6. As a direct result of the sales of the precursor chemicals, defendant Kahn obtained substantial income and resources, a portion of which was converted into a personal loan in the amount of $120,000.00 to Edwin Dickson.

DATED: May__, 1991.

Respectfully submitted,

WILLIAM BRANIFF
United States Attorney

MICHAEL E. LASATER
Assistant U.S. Attorney

APPROVED AS TO FORM

DATED: _____ _____

DOUGLAS BROWN, Esq.
Counsel for defendant
Jerome Kahn

The court concurs with the above findings of fact.

June 4, 1991 //s//
DATED: _____ _____

WILLIAM B. ENRIGHT
United States District Judge

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